Supreme Court, U.S.
FILED
DEC 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-859

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

MILTON FRIEDMAN,

*Petitioner,*

- vs. -

FLOYD R. GANASSI, G. GRAY GARLAND, JR., STANLEY B. SCHEINMAN, JAMES W. COOPER, LAIDLAW ADAMS & PECK, INC., and THE OHIO COMPANY, the latter two defendants being sued individually and representatively on behalf of a class of defendants similarly situated and ARTHUR YOUNG & CO., a partnership,

*Respondents.*

# BRIEF OF ARTHUR YOUNG & COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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# BRIEF OF ARTHUR YOUNG & COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

## STATEMENT OF THE CASE

Because suits under section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, are seldom litigated to verdict, the courts are rarely called upon to award costs in such a case. For this reason, there is little law -- and little interest -- as to how courts reconcile section 11(e), which provides for the award "of the costs of such suit, including reasonable attorney's fees" where "the suit or the defense [was] without merit," with the taxable costs

provisions of rule 54(d) of the Federal Rules of Civil Procedure.

This class claim under section 11 was litigated to verdict, with the jury deliberating less than two hours -- after five week of trial -- before finding respondents not liable. Recognizing, as the trial judge later found, that petitioner's claim was "not entirely without merit," *Friedman v. Ganassi*, 674 F. Supp. 1165, 1166 (W.D. Pa. 1987) (the "District Court Opinion") (reprinted in Appendix A to the Petition for a Writ of Certiorari (the "Petition")), respondents did not seek attorneys' fees under section 11(e), but rather pursued only the taxable costs that go "as of course to the prevailing party" under rule 54(d). Believing that section 11(e) precluded an award of taxable costs under rule 54(d), the trial court denied respondents' bills of costs.

The Third Circuit reversed in an opinion which shed considerable light on this narrow and arcane issue. *Friedman v. Ganassi*, 853 F.2d 207 (3d Cir. 1988) (the "Third Circuit Opinion") (reprinted in Appendix B to the Petition). In a thoughtful and well-reasoned reconciliation of section 11(e) and rule 54(d), that court traced the evolution of cost awards, analyzed the legislative history of section 11(e), looked to analogous statutes and discussed the policy considerations underlying both the statute and the rule. It concluded that rule 54(d) governs the award of taxable costs where, as here, they are sought by a prevailing party, while section 11(e) governs the awarding of attorney's fees where a claim or defense is without merit.

In seeking certiorari in this Court, petitioner has offered no compelling reason for review of such a narrow and seldom-considered issue, particularly when the Third Circuit has rendered such a careful and compelling opinion.

## ARGUMENT

### I.

### THERE IS NO CONFLICT BETWEEN SECTION 11(e) OF THE SECURITIES ACT OF 1933 AND RULE 54(d) OF THE FEDERAL RULES OF CIVIL PROCEDURE WHICH REQUIRES RESOLUTION BY THIS COURT

The Petition argues that rule 54(d) of the Federal Rules of Civil Procedure is subordinate to section 11(e) of the Securities Act of 1933, 15 U.S.C. 77k(e) (the "Securities Act"), *see* Petition at 8-10, and that the Third Circuit Opinion renders section 11(e) "meaningless." *See* Petition at 12-14. Numerous lower federal courts have explicitly, and this Court has implicitly, reconciled the taxable cost provisions of rule 54(d) with statutes which, like section 11(e), make reference to costs and have done so without rendering the statutes "meaningless." The only novelty here is that the Third Circuit Opinion is the first such reconciliation under the Securities Act. It is entirely consistent with prior decisions under the antitrust and civil rights statutes and presents no issue worthy of this Court's consideration.

The Third Circuit applied rule 54(d) to an award of the kind of taxable costs specified in 28 U.S.C. § 1920 and ruled that section 11(e) is applicable to attorneys' fees and other special costs. This analysis reflects the historical distinction between taxable costs -- "costs between party and party" -- and "costs as between solicitor and client," such as attorneys' fees and expert witness fees. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S. Ct. 2494 (1987); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 164 (1939) (distinguishing attorneys' fees and certain other expenses from "ordinary taxable costs").

Petitioner's argument, in essence, is that, because section 11(e) refers to "costs," rule 54(d) can never be applicable in a section 11 case. Under that rationale, taxable costs under rule 54(d) could never be awarded in a case tried under a statute with a similar reference to "costs." There are scores of such statutes and the cases which have considered the issue have generally held, as did the court below, that taxable costs are awarded under rule 54(d) and special costs, such as attorneys' fees and expert witness fees, are awarded under the statute. *See, e.g., Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 896 (3d Cir. 1985) (civil rights); *Tillman v. Wheaton-Haven Recreation Ass'n*, 580 F.2d 1222, 1230 (4th Cir. 1978) (same); *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 224 (9th Cir. 1964) (antitrust); *International Wood Processors v. Power Dry, Inc.*, 598 F. Supp. 299, 302 (D.S.C. 1984), *aff'd*, 792 F.2d 416 (4th Cir. 1986) (same); *Government of the Virgin Islands v. 19.623 Acres of Land*, 602 F.2d 1130 (3d Cir. 1979) (condemnation); *ADM Corp. v. Speedmaster Packaging Corp.*, 525 F.2d 622 (3d Cir. 1975) (patent). Each of these decisions would be wrong under petitioner's theory.

Although this Court has never directly addressed this issue, either under the securities laws or other statutes, it is implicit in several of this Court's decisions that taxable costs are awarded under rule 54(d) and attorneys' or witness fees arise under the substantive statute at issue. For example, this Court could not have rendered its *Crawford Fitting* decision, with rule 54(d) as a centerpoint of its analysis, if that rule were inapplicable whenever, as in that antitrust case, a relevant statute authorized attorneys' fees and costs. *See also Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351 (1981) (civil rights); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946) (selective service).

## II.

## THERE IS NO CONFLICT AMONG THE CIRCUITS WHICH REQUIRES RESOLUTION BY THIS COURT

Petitioner rests part of his argument for certiorari on a supposed conflict among the circuits. In fact, petitioner can cite only two cases decided almost 25 years apart, the decision below and *Can-Am Petroleum Co. v. Beck*, 331 F.2d 371 (10th Cir. 1964).[1] That hardly bespeaks an issue crying out for resolution.

Further, the decisions are not necessarily in conflict. The case below involved only costs under rule 54(d), while *Beck* involved costs and attorney's fees only under section 11(e). It is not clear from the *Beck* decision that the Tenth Circuit would have reversed had the only award been for taxable costs and had that award been made under rule 54(d).[2] Finally, *Beck* contains no analysis at all of the issues raised by the Petition. This is in sharp contrast to the detailed analysis and resolution of the issues in this case by the Third Circuit.

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[1] Petitioner claims the decision below conflicts, not only with *Beck*, but also "with all other reported decisions under the Securities Act of 1933." Petition at 17. In fact, the "all" can only refer to one unreasoned 1980 district court decision, *McLish v. Harris Farms, Inc.*, 507 F. Supp. 1075 (E.D. Cal. 1980). The other decisions involving rule 54(d) and section 11(e) are collected in the Third Circuit Opinion, *see* Petitioner's Appendix B at 12a-13a, and they, at most, "imply the adoption of one position or another." *Id.* at 12a, quoting District Court Opinion, Petitioner's Appendix A at 3a.

[2] *Nemeroff v. Abelson*, 620 F.2d 339 (2d Cir. 1980), involved rule 54(d) and section 9(e) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(e), which is similar to section 11(e) of the Securities Act. The lower court awarded attorneys' fees under, *inter alia*, section 9(e) and costs under rule 54(d). The Second Circuit reversed the attorneys' fees award but affirmed the cost award under rule 54(d). 620 F.2d at 350-51.

## III.

## THE DECISION BELOW IS NOT CONTRARY TO THE POSITION OF THE FEDERAL RULES ADVISORY COMMITTEE

Petitioner argues that, because the Advisory Committee for the Federal Rules of Civil Procedure listed section 11(e) as "unaffected" by rule 54(d), taxable costs cannot be awarded under rule 54(d). *See* Petition at 10-12. Contrary to petitioner's argument, that notation supports the result reached below.

At the time section 11(e) was adopted to provide for attorneys' fees as a deterrent to frivolous suits or defenses, *see* 78 CONG. REC. 8185 (May 7, 1934), *reprinted* in 1 FEDERAL BAR ASS'N, *Federal Securities Laws: Legislative History, 1933-1982* at 995 (1983), the practice of prevailing parties receiving their taxable costs had been in place for 700 years. *See* Goodhart, "Costs," 38 YALE L.J. 849, 853 (1929); 6 J. Moore, W. Taggart & J. Wicker, MOORE'S FEDERAL PRACTICE ¶ 54.70[2] (2d ed. 1987). Dean McCormick, the leading scholar of the day on damages and costs, noted shortly before the federal securities laws were adopted that taxable costs were a matter of right to the prevailing party in an action at law. McCormick, "Counsel Fees and Other Expenses of Litigation as an Element of Damages," 15 MINN. L. REV. 619, 620 (1931). That right was based, "not upon express statutory enactment by Congress, but upon usage long continued and confirmed by implication from provisions in many statutes." *In re Peterson*, 253 U.S. 300, 316 (1920).

It is inconceivable that Congress, in adopting section 11(e), would have by indirection abandoned the ancient and accepted practice of awarding taxable costs to prevailing parties. Thus, if this case had been tried between the adoption of section 11(e) in 1934 and the adoption of rule 54(d) in 1938, taxable costs surely would have gone to respondents as the prevailing parties. The

continuation of that practice after adoption of rule 54(d) not only leaves section 11(e) unaffected, it also makes appropriate the awarding of taxable costs to the prevailing parties in this case.

## CONCLUSION

The decision below creates no conflict between a statute and one of the Federal Rules of Civil Procedure; no conflict among circuits; and no conflict with the views of the Advisory Committee for the Federal Rules of Civil Procedure. It is a thoughtful -- and quite correct -- analysis of a very narrow, and seldom-litigated, legal issue. In short, it raises no issues worthy of this Court's consideration and the Petition for Certiorari should be denied.

New York, New York
December 22, 1988

Respectfully submitted,

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